

ENVIRONMENTAL NEWS

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New Law Update

BY MARY PENNY THOMPSON

PERMIT SHIELD DEFENSE: IN THE CASE OF *Piney Run Preservation Ass'n v. County Comm'rs of Carroll County, Maryland*, 268 F.3d 255 (4th Cir. MD 2001), the Piney Run Preservation Association claimed that a county-operated waste treatment plant was discharging warm water into a local stream, Piney Run, in violation of the Clean Water Act.

Although the Clean Water Act imposes a "default regime of strict liability," the NPDES permitting system acts as a primary exception. *Piney Run* at 165. The 4th Circuit held that the permit shield defense of the Clean Water Act protected a permittee from liability for discharges of pollutants (heated water) not expressly regulated by the permit.

The court followed the two-part test set out in *Chevron USA Inc. v. Natural Resources Defense Council* and deferred to EPA's interpretation of the permit shield defense which indicated the NPDES permit shielded its holder from liability as long as (1) the permittee complied with the express terms of the permit and with the Clean Water Act's disclosure requirements and (2) the permittee only discharges pollutants which were within the reasonable contemplation of the permitting

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Brownfields Agreements: A Prospective Developer's Road to Success

BY JAMES W. BRYAN

IN 1997, THE N.C. GENERAL ASSEMBLY FOUND that brownfields properties are abandoned, idle and under used property that may have been or were contaminated by past industrial and commercial activities but that are attractive locations for redevelopment. N.C. Sess. Laws § 1997-357 s. 1.

The safe redevelopment of brownfields would benefit the citizens of North Carolina in many ways, stated the legislature, and potential purchasers of brownfields who have no connection with the contamination should be encouraged to provide capital and labor to improve brownfields without undue risk of liability for problems they did not create. *Id.* Therein lay the foundation for the Brownfields Property Reuse Act of 1997. N.C.G.S. § 130A-310.30 *et seq.*

At the present moment in 2002, the N.C. Brownfields Program within the N.C. Dept. of Environment and Natural Resources (NCDENR) encourages the safe reuse of abandoned properties that have some measure of environmental impairment.

Under a "brownfields agreement" with a prospective developer (who did not cause or contribute to the contamination), NCDENR defines the necessary cleanup and land management actions, and the prospective developer receives liability protection—in effect, NCDENR's covenant-not-sue—that allows the developer to obtain previously unobtainable loans for the project.

The brownfields agreement in no way changes the legal liability for the responsible parties to the site. The program serves as a means to turn abandoned properties into productive use and to benefit the public interest. See the Web site of NCDENR's Brownfields Program at www.ncbrownfields.org.

The first brownfields agreement was consummated in April 1998 involving an abandoned textile plant. Today, according to Tony Duque of the Brownfields Program, there are 16 fully executed brownfields agreements in place, with another one soon to be approved if it advances through the pub-

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unless otherwise agreed to in writing by the Parties. At the end of that period, the Prospective Developer shall notify DENR of the location of such documents and shall provide DENR with an opportunity to copy any documents at the expense of DENR.

XIV. PAYMENT OF ENFORCEMENT COSTS

28. If the Prospective Developer fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section V (Work to be Performed), it shall be liable for all litigation and other enforcement costs incurred by DENR to enforce this Agreement or otherwise obtain compliance.

XV. NOTICES AND SUBMISSIONS

29. Unless otherwise required by DENR, all notices and submissions pursuant to this Agreement may be sent by prepaid first class U.S. mail, as follows:

- a. for DENR:
Mr. Tony Duque
Brownfields Project Manager
Superfund Branch, DWM
Department of Environment and Natural Resources
1646 Mail Service Center
Raleigh, NC 27699-1646
- b. for Prospective Developer:
CMDC Wilkinson No.1 2000 LLC
c/o Mr. Lawrence Toliver
Charlotte-Mecklenburg Development Corpo.
P.O. Box 36836
Charlotte, NC 28236

Notices and submissions sent by prepaid first class U.S. mail shall be effective on the third day following postmarking. Notices and submissions sent by hand or by other means affording written evidence of date of receipt shall be effective on such date.

XVI. EFFECTIVE DATE

30. The effective date of this Agreement shall be the earlier of the third day after DENR sends notice to Prospective Developer by prepaid first class U.S. mail, or the day DENR notifies Prospective Developer by facsimile, if DENR does so, that DENR has fully executed the Agreement after review of and response to any public comments received.

XVII. TERMINATION OF CERTAIN PROVISIONS

31. If any Party believes that any or all of the obligations under Section VI (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the Party requesting such termination receives written agreement from the other Party to terminate such provision(s).

XVIII. CONTRIBUTION PROTECTION

32. With regard to claims for contribution against Prospective Developer in relation to the subject matter of this Agreement, the Parties hereto agree that the Prospective

Developer is entitled to protection from such claims to the extent provided by N.C.G.S. § 130A-310.37(a)(5)-(6). The subject matter of this Agreement is all remediation taken or to be taken and response costs incurred or to be incurred by DENR or any other person in relation to the Property.

33. The Prospective Developer agrees that, with respect to any suit or claim for contribution brought by it in relation to the subject matter of this Agreement, it will notify DENR in writing no later than 60 days prior to the initiation of such suit or claim.

34. The Prospective Developer also agrees that, with respect to any suit or claim for contribution brought against it in relation to the subject matter of this Agreement, it will notify DENR in writing within 10 days of service of the complaint on it.

XIX. PUBLIC COMMENT

35. This Agreement shall be subject to a 60-day public comment period dating from publication of the approved summary of the Notice of Intent to Redevelop a Brownfields Property required by N.C.G.S. § 130A-310.34 in the North Carolina Register or a newspaper of general circulation serving the area in which the Property is located, whichever shall occur later. After expiration of that period, or following a public meeting if DENR holds one pursuant to N.C.G.S. § 130A-310.34(c), DENR may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES

By: _____

Dexter R. Matthews, Interim Director, Division of Waste
Management

Date: _____

IT IS SO AGREED:

CMDC Wilkinson No.1 2000 L.L.C.

By: _____

Robert J. Sweeney Jr., Member/Manager

Date: _____

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lic comment period without a problem.

Duque has provided *Environmental News* with a sample brownfields agreement from a project in Charlotte. We have reprinted it on page 6 to show our readers what the final legal document can look like after NCDENR and the prospective developer conduct extensive negotiations to reach an agreement. The contract is a public document and both parties—NCDENR and CMDC Wilkinson No. 1 2000 LLC—are pleased to have it reprinted here. ■

**BRYAN WORKS WITH ADAMS, KLEEMEIER, HAGAN,
HANNAH AND FOUTS PLLC IN GREENSBORO.**